

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

September 15, 2006 Session

**SONYA BLAKE, widow of TERRY BLAKE v. AUTO-OWNERS
INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Weakley County
No. 18707 William Michael Maloan, Chancellor**

No. W2005-01545-WC-R3-CV - Mailed December 29, 2006; Filed January 30, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The only issue presented in this case is whether the trial court erred in finding Terry Blake was an employee of Southside Baptist Church within the meaning of the Tennessee Workers' Compensation Act at the time of his fatal injury on April 29, 2004. In our view, the evidence does not preponderate against the trial court's finding that Blake was an employee, and we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT E. CORLEW, III, SP. J., joined.

Kyle C. Atkins, Humboldt, Tennessee, for the Appellant, Auto-Owners Insurance Company.

T. J. Emison, Alamo, Tennessee, for the Appellee, Sonya Blake.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Terry Blake was a cabinet builder and general handyman. He did business as Blake's Custom Cabinets. He and his wife, Sonya Blake, were members of the Southside Baptist Church ("Southside"). Terry Blake was a member of Southside's Vision and Planning Committee which was in the process of building new facilities. Southside had purchased twenty-one acres south of

Martin. A pavilion and a prayer house had been constructed on the property, and the church eventually intended to construct a primary church building there.

Jesse Moore Wade, a member of Southside, served as chairman both of the Board of Trustees and the Vision and Planning Committee. Wade testified the church employed Terry Blake to work on the pavilion and other buildings to be constructed on the property they had purchased. Blake had done some work on clearing the land and on the pavilion, for which he was not paid. The committee felt he was working too many hours on Southside's facilities and neglecting his regular occupation. The committee decided to pay him \$25 per hour for the time he spent on construction of Southside's facilities. Blake was paid only for the labor he performed on the project. The church purchased all materials. While Blake averaged about twenty hours per week working for the church, he was free to work as much as he wanted for his other customers. Southside did not control what hours Blake worked on the project. Blake furnished his own tools except for equipment that he did not own. If he needed something he did not own, the church rented it for him.

Mr. Wade signed the application for a building permit to construct the pavilion dated June 27, 2003. The contractor's name was listed as Southside Baptist Church; the address listed was that of Southside. Blake was not a licensed contractor with the State of Tennessee. Southside paid him by check, and no federal taxes were withheld. Blake and Wade, who was himself involved in the building materials and construction business, met periodically in order to discuss what work was to be done and how it was to be done. Wade testified that Blake's work was controlled by Southside and that Southside had the right to terminate Blake at any time. Southside selected and hired any helpers to be used by Blake except on one occasion when Blake brought his own helper. Southside objected to Blake's using that individual and, as a result, he did not return to the site.

On April 29, 2004, Terry Blake was installing flashing around the chimney of the pavilion and fell. He died four days later as a result of injuries sustained in the fall.

The trial court determined that Blake was an employee at the time of his injury and subsequent death. Noting that it was a close case, the trial judge held the right of control was the most important factor in determining whether Blake was an employee. Based upon the testimony of Mr. Wade, the trial court found Southside, through Mr. Wade, controlled or maintained the right to control what was to be done by Blake and the manner in which it was to be done. The court also noted that Southside maintained the right to terminate Mr. Blake at any time and that Mr. Blake was paid by the hour, which was indicative of an employment relationship. The court also held Mr. Blake was not a casual employee because building facilities to be used in Southside's ministry was a part of the mission or business of the church.

II. STANDARD OF REVIEW

The standard of review for issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143,

149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Indus. Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

III. ANALYSIS

Appellant asserts Plaintiff's injury occurred while Plaintiff was working as an independent contractor and that he failed to prove he was an employee who suffered an accidental injury arising out of and in the course of his employment. While a plaintiff in a workers' compensation action has the burden of proving each element of his case by a preponderance of the evidence, King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991), once it is established that an employment relationship exists, the burden is on the employer to prove the worker was an independent contractor rather than an employee. Galloway v. Memphis Drum Service, Inc., 822 S.W.2d 584, 586 (Tenn. 1991); Jones v. Crenshaw, 645 S.W.2d 238, 240 (Tenn. 1983). In addition, because the Workers' Compensation Law must be rationally but liberally construed to promote and adhere to the Act's purpose of securing benefits to those workers who fall within its coverage, this Court will resolve doubts in favor of a finding that a worker is an employee rather than an independent contractor. Galloway, 822 S.W.2d at 586; Armstrong v. Spears, 393 S.W.2d 729, 731 (1965).

The factors to be considered in determining whether a person is an "employee" or an "independent contractor" are set forth by statute. Tennessee Code Annotated section 50-6-102(11) provides:

(11) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

- (A) The right to control the conduct of the work;
- (B) The right of termination;
- (C) The method of payment;
- (D) The freedom to select and hire helpers;
- (E) The furnishings of tools and equipment;
- (F) Self scheduling of working hours; and
- (G) The freedom to offer services to other entities;

Tenn. Code Ann. § 50-6-102 (11) (2005). No one fact is deemed to be determinative, but the right to control and the right to terminate are usually deemed to be strong evidence of an employer-employee relationship. Starflight, Inc. v. Thoni, 773 S.W.2d 908, 910 (Tenn. 1989). The facts that the employer does not withhold income taxes or social security and that the employee furnishes his own tools are not sufficient, in themselves, to establish an independent contract relationship. Id.

Based upon these principles, we agree with the trial court's conclusion that Terry Blake was an employee, rather than an independent contractor, at the time of his fatal accident. The trial court found Southside maintained control over Mr. Blake's work and retained the right to terminate him at any time. The evidence does not preponderate against these findings. The method of payment is of no assistance to the Appellant. While the fact federal taxes were not withheld would tend to indicate an independent contractor status, the fact that Mr. Blake was paid by the hour indicates with equal force that Mr. Blake was an employee. Additionally, the record would support a finding that Mr. Blake did not have the right to select and hire helpers. When Mr. Blake brought his employee to the site to help on the pavilion, Southside objected and that employee did not return. The furnishing of tools is not significant under the circumstances of this case. If Mr. Blake owned the tools he needed, he used his own. If he needed tools he did not own, Southside rented them. It is clear that Mr. Blake scheduled the hours he worked on Southside's project and was free to offer his services to others. The fact he averaged twenty hours per week working on construction of the pavilion indicates he was dedicating a good portion of his workweek to this project. Because of the time he spent working for Southside, his ability to schedule his own hours and to work for others would not outweigh the two statutory factors cited by the trial court – that Southside maintained control over Mr. Blake's work and retained the right to terminate him. The trial court's finding that Mr. Blake was an employee rather than an independent contractor is affirmed.

Appellant next alleges the trial court erred in finding Mr. Blake was not a casual employee at the time of his injury. Tennessee Code Annotated section 50-6-106(2) provides that the Workers' Compensation Law shall not apply to "[a]ny person whose employment at the time of injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer . . ."

In Armstrong, the Tennessee Supreme Court stated: "Employment is 'casual' when it is irregular, unpredictable, sporadic and brief in nature." 393 S.W.2d at 732 (quoting Vol. 1, § 51 of Larson on Compensation). Thus, where the employer undertakes a construction project that spans an extended period of time, our courts have held the undertaking to be within the employer's usual course of business. In Black v. Corder, 399 S.W.2d 762 (1966) a service station and appliance store operator decided to build a retaining wall across the rear of the property on which these businesses were located. Two persons, including Corder, experienced in construction work, were hired to take charge of the project and additional helpers were employed to complete the work. The project was to take about seventy-five days to complete. The Tennessee Supreme Court held that while the persons hired to construct the retaining wall would be casual employees and excluded from coverage with regard to the service station and appliance store businesses, because of the magnitude and

length of the project, the service station operator was considered as having gone into the separate business of constructing the retaining wall. The Court also held that, as to the business of constructing the wall, Corder was not a casual employee and was covered by the Workers' Compensation Law. Id. 399 S.W.2d at 765.

Similarly, in the present case, Mr. Wade testified Southside was in the business of ministering to the community. Southside's ministry was going to be enhanced through the use of the pavilion for church purposes. Southside undertook to construct a prayer house, a pavilion, and, eventually, a church building. The project had already extended over a considerable length of time at the time of Mr. Blake's fall. The application for the building permit was dated June 27, 2003, and the accident occurred over ten months later on April 29, 2004. Southside applied for and was granted a building permit to construct the pavilion listing itself as the contractor of the project. Based upon this evidence, the trial court found Southside had made construction of the pavilion a part of its business and, as to this business, Mr. Blake was not a casual employee. In our view, the evidence presented does not preponderate against the finding of the trial court.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant, Auto-Owners Insurance Company.

DONALD P. HARRIS, SENIOR JUDGE

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JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Auto-Owners Insurance Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM